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DOI:

[10.1080/09615768.2017.1306335](https://doi.org/10.1080/09615768.2017.1306335)

Document Version

Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Grant, J. (2017). Prerogative, Parliament and Creative Constitutional Adjudication: Reflections on Miller. *King's Law Journal*, 28(1), 35-61. <https://doi.org/10.1080/09615768.2017.1306335>

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Prerogative, Parliament, and Creative Constitutional Adjudication: Reflections on *Miller*

James Grant*

I. *MILLER'S CHOICE*

If the Supreme Court's decision in *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* had gone the other way, the decision to withdraw from the European Union would have been a decision neither for voters in a referendum nor necessarily for Parliament, but for Her Majesty's Government in the exercise of the royal prerogative.¹ That conclusion, supported by the three dissenting Justices of the Supreme Court, may have surprised many people. But it would not have been contrary to any requirements of the United Kingdom's constitution. Despite what all the judges who heard the case seem to have thought, constitutional law was silent on the question, until the majority in the Supreme Court made parliamentary authorisation a requirement. That does not, of course, entail that the majority was wrong to do so. But it does entail that the majority's judgment was not, as they claimed, merely an orthodox application of established constitutional law. The Supreme Court had a choice.

The legal challenge to the government's authority to trigger Article 50 of the Treaty on European Union, the first step in the process of leaving the EU, has been widely described as 'the constitutional case of the century'.² It is easy to get carried away, but

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¹ *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5. All paragraph references are to the majority's judgment unless otherwise stated. Lord Neuberger PSC, Lady Hale DPSC, and Lords Mance, Kerr, Clarke, Wilson, Sumption, and Hodge constituted the majority. Lords Reed, Carnwath, and Hughes dissented.

² See eg 'Brexit in the Supreme Court' (The Constitution Unit, UCL, 30 January 2017) <<https://www.ucl.ac.uk/constitution-unit/constitution-unit-events/brexit-in-supreme-court>> accessed 27 February 2017.

certainly the media's interest in the case was unlike anything that had been seen before in the UK. After the Divisional Court held that the government needed parliamentary authorisation to trigger Article 50,³ the three judges who decided the case faced visceral attacks from some people who thought the decision to withdraw had already been made in the referendum. Grossly misleading newspaper articles in the *Daily Express* and the *Daily Mail* among others, which had campaigned for the UK to leave the EU ('Brexit'), described the judges as having 'blocked Brexit' and, chillingly, as 'enemies of the people'.⁴

Troubled by this misunderstanding of the case, Lord Neuberger of Abbotsbury, the President of the Supreme Court, opened the hearing of the government's appeal, which was broadcast live on the BBC News and Sky News channels, with a statement designed in part to depoliticise the case. 'The Supreme Court exists to decide points of law which fall within its jurisdiction,' Lord Neuberger reassured the audience. 'This appeal is concerned with legal issues, and as judges, our duty is to consider those issues impartially and to decide the case according to the law. That is what we will do.'⁵ The Divisional Court had made the same point at the beginning of its judgment: 'It deserves emphasis at the outset that the court in these proceedings is only dealing with a pure question of law.'⁶

But deciding questions of law is not all that judges do in fulfilling their judicial role. Or more precisely, at least in common law systems such as the UK's, judges do not merely have a duty to interpret and apply the law. They also have a power to develop and change the law, a power which arises most uncontroversially when the law does not fully determine the court's decision. This indeterminacy in the law does not arise because there is disagreement about what the law requires. Disagreement about the law, far from entailing that there is no legally right answer, presupposes that there is a legally right

³ *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

⁴ 'We Must Get Out of the EU' (*Daily Express*, 4 November 2016); 'Enemies of the People' (*Daily Mail*, 4 November 2016); see also 'The Judges versus the People' (*Daily Telegraph*, 4 November 2016).

⁵ UK Supreme Court, *Transcript of Hearing 5 December 2016* pages 3–4 <<https://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf>> accessed 27 February 2017.

⁶ *Miller* (n 3) [5] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR, Sales LJ).

answer. In disagreeing about what the right answer is we presuppose that there is a right answer worth disagreeing about. However, sometimes our reasoning drives us to the conclusion that there is no uniquely right answer.⁷ When the law runs out in this sense, it leaves a gap in which the court must choose between competing decisions, each of which is legally permissible but not required. In such cases, the court does not merely apply the law, but develops it, changing the law by making it more determinate—a development which requires the court to consider principles from outside the law.

In the *Miller* case, the Supreme Court was faced with a question on which the constitutional requirements were indeterminate, which entailed a choice between constitutionally permissible decisions. Yet that is not how the Supreme Court viewed the matter. Sitting for the first time *en banc*, the Supreme Court held, by a majority of eight to three, that the established requirements of the constitution did not give the government authority to trigger the process of leaving the EU without an Act of Parliament conferring that authority. On a secondary issue, the Supreme Court unanimously held that the consent of the devolved legislatures in Scotland, Wales, and Northern Ireland was not legally required before starting the process of leaving the EU, and that it was not open to the Court to develop the law to make it a legal requirement.

In my view, the majority's reasoning does not support their conclusion on the first issue. But that is not to say that their conclusion cannot be justified on other grounds. As far as the legal grounds are concerned, the minority, and especially Lord Reed, convincingly explained that there were no existing legal requirements prohibiting the Crown from deciding to withdraw from the EU and notifying the European Council of that intention. But arguably the minority paid insufficient attention to the question of whether the court should have developed the law in a way that supports the majority's conclusion. Perhaps that is because the majority gave no cogent reason for such a development, believing they had found a right answer in the existing law. The majority's conclusion can be justified only if it would have been morally and politically illegitimate for the executive, which is accountable to Parliament, to have the power to decide to withdraw from the EU without express parliamentary authorisation. As we shall

⁷ See HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, Clarendon Press 2012) 131–32; Joseph Raz, 'Legal Reasons, Sources and Gaps' in his *The Authority of Law* (OUP 1979) 70.

see, defending that conclusion is more difficult than the majority assumed.

II. THE MAIN ISSUE IN *MILLER*

The main issue for the Supreme Court in *Miller* was whether the royal prerogative provided the government with the authority to start the process of withdrawing from the EU. Counsel for the claimants argued that the prerogative did not extend to withdrawing from the EU, and so it was not necessary to show that Parliament had expressly prohibited a power that does not exist; rather, the government needed to show that Parliament had conferred a statutory power, which it had not. Counsel for the Secretary of State conceded that Parliament had not conferred a statutory power, but argued that the foreign affairs prerogative did include the power to withdraw from the EU, and that Parliament had done nothing to take that power away. The disagreement, therefore, was centrally about the scope of the foreign affairs prerogative, and whether it extended to the decision to withdraw from the EU.

Some commentators, however, have doubted whether the government was right to concede that the government lacked a statutory power to withdraw from the EU. They make the surprising claim that the power to withdraw under Article 50 of the Treaty on European Union, as introduced by the Lisbon Treaty signed on 13 December 2007, has been incorporated into domestic law by the European Communities Act 1972, as amended,⁸ and that Parliament

⁸ European Union (Amendment) Act 2008, adding the Treaty on European Union, which contains Article 50, to the list of Treaties in the European Communities Act 1972 Act, s 1.

had therefore already conferred a statutory power to withdraw.⁹ It is worth setting out the relevant wording of Article 50:¹⁰

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. ...

The claim that Article 50 has direct effect in domestic law depends on section 2(1) of the 1972 Act, which states that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ...

It is claimed that, by adding the Lisbon Treaty to the list of Treaties to which this section applies, Parliament had already provided statutory authorisation for the government to decide to withdraw from the EU, and any prerogative power to withdraw went into abeyance. Proponents of this view, while conceding that Article 50 does not state which institution of the Member State has the power to decide to withdraw, seem to be content merely to insist that, under the UK's

⁹ For proponents of this argument, see Robert Craig, 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79 *Modern Law Review* 1019; KD Ewing, 'Editor's Introduction' (2016) 27 *King's Law Journal* 289, 291–92. For a different but related argument that section 2(2) of the 1972 Act provides a statutory basis for the power to trigger Article 50, see Adam Tucker, 'Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny' (*UK Constitutional Law Blog*, 29 June 2016) <<https://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/>> accessed 27 February 2017.

¹⁰ Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 50. The Treaty came into force on 1 December 2009.

constitutional arrangements, '[f]oreign affairs is ... by definition carried out by the Executive'.¹¹

This argument is flawed for at least two main reasons. First, as the majority in the Supreme Court pointed out, Article 50 'operates only on the international plane'—that is, it is not (as section 2(1) puts it) 'to be given legal effect or used in the United Kingdom'—and so 'is not therefore brought into UK law through section 2 of the 1972 Act'.¹² Secondly, even if it were applicable in domestic law, Article 50 refers to a Member State's own constitutional requirements—that is, its *existing* requirements—and leaves those requirements unchanged. It leaves unanswered the question: under the Member State's constitution, who is permitted or required to make the decision to withdraw from the EU? In the UK, the executive has the power to conduct foreign affairs, but the question—which is not answered by Article 50, even if it had been brought into domestic law (which it had not)—is whether there are any constitutional requirements that limit this power, such that it does not extend to the decision to withdraw from the EU.

So the question is about of the foreign affairs prerogative. Under that prerogative, the government may, among other things, 'negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty.'¹³ The effect of this power is that the Crown can 'irrevocably bind the nation'.¹⁴ That is, the treaty will 'bind the nation'—or, more accurately, the state—under international law, but it will not give rise to any rights and duties in domestic law, until it is incorporated into domestic law by an Act of Parliament. This is the dualist approach: the executive can create legal obligations on the international plane, but only an Act of Parliament can incorporate those international obligations into domestic law. The corollary, in this simplified picture, is that the executive can extinguish international legal obligations, but only an Act of Parliament can extinguish the obligations that have been incorporated into domestic law.

¹¹ Craig (n 9) 1048.

¹² *Miller* (n 1) [104]; see also [79] and [105]. See also Gavin Phillipson, 'A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament' (2016) 79 *Modern Law Review* 1064, 1070–76.

¹³ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476 (Lord Templeman).

¹⁴ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765) 244.

The central question in *Miller* was: do the special features of EU law—which gives rise to ‘directly effective’ rights enforceable in the domestic courts (what the 1972 Act calls ‘enforceable EU rights’)—affect the scope of the government’s prerogative power in relation to EU treaties, with the result that the prerogative does not include the power to withdraw from those treaties? The majority answered this question in the affirmative. It did not go quite so far as to say that the prerogative power could not be used to change EU law, and hence to change enforceable EU rights under the 1972 Act. Instead, the majority drew a distinction between the prerogative power to contribute to the process of changing EU law (which the majority ‘readily accept[ed]’ exists) and the prerogative power to withdraw from the EU (which the majority held does not exist).¹⁵ The majority’s distinction raises two questions: Was it required by an application of existing constitutional law? If not, was majority right to develop constitutional law to make it a requirement?

III. PRECEDENT AND THE PREROGATIVE

The majority in *Miller* presented their judgment as an application of constitutional law expounded during the developments of the seventeenth century. In the *Case of Proclamations*, Sir Edward Coke told King James I that ‘the king by his proclamation or other ways cannot change any part of the common law, or statute, or the customs of the realm.’¹⁶ It would be an exaggeration to say that, after this case, the courts always backed Parliament when asked to adjudicate on the balance of power between the Crown and Parliament.¹⁷ As Coke himself told the House of Commons in 1628, ‘in a doubtful thing, interpretation goes always for the king.’¹⁸ Ultimately, the Crown’s powers were curbed not primarily by the courts, but by

¹⁵ *Miller* (n 1) [95].

¹⁶ *Case of Proclamations* (1611) 12 Co Rep 74, 75.

¹⁷ For a significant instance of the courts backing the Crown over Parliament, see *R v Hampden* (1637) 3 St Tr 825, discussed in DL Keir, ‘The Case of Ship-Money’ (1936) 52 *Law Quarterly Review* 546.

¹⁸ Quoted in Margaret A Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England, 1603–1645* (Rutgers University Press 1949) 264.

parliamentarians, and by civil war and revolution.¹⁹ But Coke's judgment in the *Case of Proclamations* was a significant judicial rebuke to the Crown, and the requirement that prerogative powers cannot 'alter the law of the land',²⁰ reaffirmed in Article 1 of the Bill of Rights 1689,²¹ is undoubtedly an important rule of constitutional law and was common ground among the parties in *Miller*.

The rule that there is no prerogative power to alter the law of the land does not entail that the prerogative cannot alter legal rights and duties under the law of the land. Indeed, one of the twentieth century's leading public lawyers, Sir William Wade, went so far as to say that the prerogative power should be defined as a legal power 'to alter people's rights, duties or status under the laws of this country which the courts of this country enforce.'²² That may have been too broad, but Supreme Court in *Miller* acknowledged that the prerogative power could at least change people's legal rights in some circumstances—for example, the Crown's power to alter civil servants' terms of service—but the majority was keen to stress that, when there is a prerogative power to change legal rights, 'it does not change the law, because the law has always authorised the exercise of the power.'²³ The law does not authorise the exercise of the treaty-making power to alter people's rights and duties under domestic law.²⁴ Under the dualist approach, as already mentioned, while treaties are not without legal effect—for even unincorporated treaties are used as

¹⁹ See Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 69–87. See also Paul Craig, 'Prerogative, Precedent and Power' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Clarendon Press 1998).

²⁰ *ibid.* See also *The Zamora* [1916] 2 AC 77 (PC), 90 (Lord Parker of Waddington).

²¹ Bill of Rights 1689, art 1: 'the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parliament is illegal'.

²² HWR Wade, *Constitutional Fundamentals* (Stevens & Sons 1980) 46.

²³ *Miller* (n 1) [52].

²⁴ It was for this reason that Wade doubted whether the treaty-making power is a prerogative power: see Wade (n 22) 47, arguing that treaty-making is 'merely a piece of administrative action on the international plane', and that it 'is not an act of power in any British constitutional sense, since it involves no special power that a British court will recognise.' See also HWR Wade, 'Procedure and Prerogative in Public Law' (1985) 101 *Law Quarterly Review* 180, 193: 'the treaty-making power is surely a non-prerogative, since the making of a treaty, by itself, cannot alter the law of the land.'

an aid to statutory interpretation—they do not directly affect legal rights and duties until incorporated by an Act of Parliament.

But EU law has a special status. The UK joined a ‘new legal order’ in 1973, and by virtue of the 1972 Act, EU law became what the majority in *Miller* described as ‘an entirely new, independent and overriding source of domestic law.’²⁵ Are enforceable EU rights, derived from this new source of law, among the laws of the land that cannot be altered by the prerogative? Or does the law allow a prerogative power to alter enforceable EU rights? Recalling Lord Diplock’s remark that it is ‘350 years and a civil war too late for the Queen’s courts to broaden the prerogative’,²⁶ you might be tempted to conclude—as the Divisional Court in *Miller* concluded—that the prerogative cannot be extended to empower the government to change enforceable EU rights.

Yet Diplock’s remark was too simplistic.²⁷ The prerogative is not fixed. Its scope is indeterminate.²⁸ Coke, in a less-frequently quoted passage in the *Case of Proclamations*, said:

[T]rue it is that every precedent hath a commencement; but where authority and precedent is wanting there is need of great consideration before that anything of novelty be established, and to provide that this be not against the law of the land.²⁹

The novelty of the EU legal order is no reason to deny that the law allows a prerogative power to change enforceable EU rights. In any case, the majority does not deny this point. Instead, the majority

²⁵ *Miller* (n 1) [82]. cf John Forman, ‘The European Communities Act 1972: The Government’s Position on the Meaning and Effect of Its Constitutional Provisions’ (1973) 10 *Common Market Law Review* 39, 43: ‘The words of the [1972] Act are ... consistent with the independent nature of the Community Legal Order, *i.e.* Community Law is regarded *as law* to be applied in the United Kingdom, and not as *United Kingdom law*.’

²⁶ *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

²⁷ cf *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864, 886 (Diplock LJ).

²⁸ See FW Maitland, *The Constitutional History of England* (CUP 1908) 418; Sebastian Payne, ‘The Royal Prerogative’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Clarendon Press 1999) 101–2.

²⁹ *Case of Proclamations* (n 16) 75 (Coke CJ).

sought to distinguish between changing EU law and withdrawing from the EU,³⁰ a distinction to which we shall return.

The majority's judgment would follow inexorably from established principles of constitutional law if a prerogative power to alter or withdraw from EU law were incompatible with statute law. The case of *Attorney General v De Keyser's Royal Hotel Ltd* established that:

[W]hen the Act deals with something which before the Act could be effected by the prerogative, and specifically empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.³¹

This principle was extended further in *Laker Airways Ltd v Department of Trade*, which concerned the Crown's treaty-making powers and provides the most promising basis for the *Miller* claimants' central proposition.³² In 1972, Laker Airways wished to operate a transatlantic service between London and New York. To do so, it was required to fulfil two conditions: first, it had to obtain a licence under the Civil Aviation Act 1971; secondly, it had to be approved by both the United States and the United Kingdom governments, under a 1946 treaty known as the Bermuda Agreement. Laker Airways was granted a licence by the Civil Aviation Authority, and was awaiting designation under the Bermuda Agreement, when a newly elected Labour government sought to use its prerogative power to cancel the airline's landing rights under the Bermuda Agreement. The case did not fall within the *De Keyser's* principle, because the statutory scheme for granting licences was meant to be used in conjunction with the prerogative power to obtain landing rights from the United States. However, the Court of Appeal in *Laker Airways* held that the government could not use its prerogative so as to deprive

³⁰ *Miller* (n 1) [78] and [95]. That said, rather inconsistently with these remarks, however, the majority also said that 'the Divisional Court was right to hold that changes in domestic rights acquired through that source [the EU Treaties] ... represent another, albeit related, ground for justifying that conclusion.'

³¹ *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin).

³² *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA).

Laker Airways ‘of the protection which the statute affords them.’³³ Given that the 1971 Act did not empower the Secretary of State to revoke the licence except in circumstances falling within section 4 of that Act (which did not apply in that case), he could not deprive the airline of the use of its licence by other means, namely the prerogative.³⁴ This principle can be generalised: the law does not allow the prerogative to frustrate a statute, and—significantly—this principle has been taken to apply even when the relevant statutory provisions have not been brought into force.³⁵ Whether a prerogative power would frustrate a statute is essentially a question of statutory interpretation.

The *Miller* case does not fall within either the *De Keyser’s* principle or the *Laker Airways* principle. Most obviously, the 1972 Act did not empower the Crown to withdraw from the EU subject to conditions. Nor, as I shall explain in the next two sections, would withdrawing from the EU frustrate the 1972 Act or any other legislation. As Paul Craig says, the *Miller* case does not so much extend as ‘radically change’ the *De Keyser’s* principle.³⁶ The central proposition defended by the claimants in *Miller* was that there can be no prerogative power to alter or withdraw from a treaty if to do so would affect rights that had been incorporated into domestic law. ‘There is,’ Craig rightly points out, ‘no case that comes close to establishing this proposition.’³⁷

The Divisional Court had previously considered and rejected a very similar proposition. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg*, the applicant, a former editor of *The Times*, sought a declaration that it would be unlawful for the Crown to ratify the Treaty on European Union, signed in Maastricht on 7 February 1992.³⁸ Like *Miller*, this challenge received much media attention, and was described by the applicant as the most

³³ *ibid* 707 (Lord Denning MR).

³⁴ *ibid* 707 (Lord Denning MR), 722 (Roskill LJ), 728 (Lawton LJ).

³⁵ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

³⁶ Paul Craig, ‘Brexit: A Drama in Six Acts’ (2016) 41 *European Law Review* 447, 463.

³⁷ *ibid* 463. See, however, Paul Craig, ‘*Miller*, Structural Constitutional Review, and the Limits of Prerogative Power’ (forthcoming).

³⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552.

important constitutional case for three centuries.³⁹ Lord Rees-Mogg's counsel, David Pannick QC, now also a peer, argued that the Crown's prerogative power to conclude treaties could not be used to change EU law, because that had been given effect in domestic law through the 1972 Act.

The Divisional Court in *Rees-Mogg* rejected that argument. As we shall see, the 1972 Act, and subsequent legislation to 'make provision consequential on' EU treaties,⁴⁰ reflected the traditional dualist approach and Parliament's limited role. Thus, as Richard Rawlings noted shortly after the *Rees-Mogg* judgment, any legal challenge to these 'orthodox views of constitutional requirement is immediately confronted with the difficult task of throwing over a whole legal framework incorporating and founded upon those views.'⁴¹ For this reason, Lloyd LJ, giving the judgment of the Divisional Court, ruled that the 1972 Act did not fetter the prerogative power 'to alter or add to the EEC Treaty':

When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary.⁴²

By avoiding a serious engagement with the applicant's arguments, the Divisional Court avoided an attempt to move the court 'towards innovative and creative constitutional adjudication.'⁴³

³⁹ cf *ibid* 561 (Lloyd LJ): 'it is in our view an exaggeration to describe it as the most important constitutional case for 300 years.'

⁴⁰ The long title of European Communities (Amendment) Act 1993 is: 'An Act to make provision consequential on the Treaty on European Union signed at Maastricht on 7th February 1992.'

⁴¹ Richard Rawlings, 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union: Part 1' [1994] *Public Law* 254, 259–60.

⁴² *Rees-Mogg* (n 38) 567 (Lloyd LJ). Section 6(1) of the European Parliamentary Elections Act 1978 states that: 'No treaty which provides for an increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament.'

⁴³ Richard Rawlings, 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union: Part 2' [1994] *Public Law* 367, 383–84.

After losing in the Divisional Court, Lord Rees-Mogg's counsel believed he had a stronger chance of winning in the higher courts,⁴⁴ but the case was not appealed due to a lack of further financial backing. Yet Lord Pannick QC, who was also counsel for Mrs Miller, eventually succeeded in persuading the three judges in the Divisional Court and eight Justices of the Supreme Court. Crucial to that victory in *Miller*, it seems, was persuading the court that his main argument did not require any creativity, but was merely an orthodox application of established rules of constitutional law. How did he do that?

IV. THE EFFECT OF EU LAW IN DOMESTIC LAW

In his dissenting judgment in *Miller*, Lord Reed accurately summarised the effect of the 1972 Act when he wrote:

[T]he effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership.⁴⁵

The majority Justices accepted the proposition in the first sentence, stating that section 2 of the 1972 Act makes directly effective EU law part of domestic law 'so long as the United Kingdom is party to the EU Treaties.'⁴⁶ Thus, it is accepted that the status of EU law in domestic law depends on two conditions: first, the UK's continuing membership of the EU; secondly, the continuing statutory basis in the 1972 Act. What the majority and minority disagree about is whether the 1972 Act has any implications for the UK's membership of the EU, such that the prerogative is curtailed.

The majority drew attention to the long title of the 1972 Act, which reads: 'An Act to make provision in connection with the

⁴⁴ David Pannick QC, Opinion (30 July 1993) paras 7, 14, and 15, cited in Rawlings (n 43) 385.

⁴⁵ *Miller* (n 1) [177] (Lord Reed).

⁴⁶ *ibid* [64].

enlargement of the European Communities to include the United Kingdom ...'. This, the majority said, 'is not easy to reconcile with a prerogative power to achieve the opposite.'⁴⁷ However, John Finnis has drawn attention to the contrast between the 1972 Act and the legislation to make provision for the new status of the UK's former colonies, which each contain a long title of the form: 'An Act to make provision *for, and* in connection with, the attainment by [the former colony] of fully responsible status within the Commonwealth.'⁴⁸ The majority read the long title of the 1972 Act *as if* it made provision '*for, and in connection with,*' the enlargement of the European Communities to include the UK. Yet Parliament studiously avoided that formulation, which it had frequently used, and continued to use, in other statutes.

As the majority accepted, the way in which the 1972 Act gave effect to enforceable EU rights in domestic law entailed that those rights could vary 'from time to time'.⁴⁹ The question is whether they could vary as a result of the Crown's prerogative power and, if so, whether the Crown has the power to reduce those rights to nil. It is true that, on the basis of existing constitutional principle set out in the previous section, the prerogative cannot be used to alter or revoke rights granted by Parliament. But the inherently *conditional* nature of the 1972 Act (which, as I said, was accepted by the majority) entails that the rights granted by Parliament are conditional on their continued availability under the EU Treaties. Again, Lord Reed put this point well when he wrote:

If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those circumstances occur. If those circumstances comprise the UK's withdrawal from a treaty, the rights are not revoked by the Crown's exercise of prerogative

⁴⁷ *ibid* [88]. See also *Miller* (n 3) [93] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR, and Sales LJ).

⁴⁸ John Finnis, *Brexit and the Balance of Our Constitution* (Policy Exchange 2016) 11. See eg the Barbados Independence Act 1966, the Fiji Independence Act 1970, and the Bahamas Independence Act 1973.

⁴⁹ European Communities Act, s 2(1).

powers: they are revoked by the operation of the Act of Parliament itself.⁵⁰

The majority's response to this point is very weak.⁵¹ It ultimately depended not on statutory interpretation and Parliament's intention, but on the court's development a new constitutional principle, which we will come to later.

Once the conditional effect of EU law in domestic law is properly understood, many related arguments fall away. For example, it was argued that withdrawal from the EU would deprive UK citizens of the right to vote in elections for the European Parliament, contained in section 8 of the European Parliamentary Elections Act 2002. But this right is also inherently conditional on the UK's continued membership of the EU.⁵² Withdrawal from the EU would not deprive UK citizens of a right to vote that continues to exist under the (unrepealed) 2002 Act; rather, the statutory right would cease to exist because the circumstances on which its existence depended have ended. That does not entail that the Crown has a prerogative power to withdraw from the EU; however, it does entail that the use of that prerogative would not conflict with the rule derived from the *Case of Proclamations*, because it would not alter the law of the land.

One possible objection to this analysis, mentioned briefly in the submissions of counsel for the claimants, is that it appears to be inconsistent with section 18 of the European Union Act 2011. On its face, section 18, which is commonly referred to as the 'sovereignty clause', merely declares what the courts had all along accepted—namely, that the status of EU law in domestic law depends on a continuing statutory basis, which Parliament could (expressly) repeal at any time.⁵³ But Lord Pannick QC and Dominic Chambers QC

⁵⁰ *Miller* (n 1) [219] (Lord Reed). See also Lord Millett, 'Prerogative Power and Article 50 of the Lisbon Treaty' (2016) 7 *UK Supreme Court Yearbook* 190, 191–92, pointing the principle in *Case of Proclamations* 'is subject to the qualification that Parliament may grant rights on terms which cause them to expire automatically ... in certain circumstances.'

⁵¹ *ibid* [77].

⁵² Consolidated Version of the Treaty on the Functioning of the European Union [2012] C326/47, art 20(2).

⁵³ *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603, 659 (Lord Bridge of Harwich); *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [79] (Lord Reed).

argued that, in addition, this section affirms that only Parliament can remove the effect of EU law in domestic law. Section 18 states that:

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom *only* by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.⁵⁴

Counsel for the claimants stressed the word ‘only’ in this section, which they argued is a strong indication that Parliament intended that EU law’s status in domestic law should *not also* depend on whether the government exercises its prerogative power to withdraw.⁵⁵ The essence of this argument is that, just as it was solely for Parliament to give EU law effect in domestic law, so it is solely for Parliament to remove that effect. But this interpretation of section 18 of the 2011 Act—which, despite discussion during the hearing, was not considered in the Supreme Court’s judgments—is unsound because it overlooks the fact that the 1972 Act is *itself* inherently conditional on the UK’s continued membership, a point that the majority accepted.

Once it is accepted that the 1972 Act gave effect to EU law on this conditional basis, does it follow that there is a prerogative power to withdraw from the EU? As we saw in the previous section, statutes that confer rights in a conditional way, and that appear to leave the prerogative unscathed, have occasionally been interpreted by the courts as fettering the prerogative. The *Laker Airways* case is a striking example of this: the exercise of a statutory licence right was, in practical terms, conditional on a designation under a treaty, but the court nonetheless held that the prerogative could not be used to undermine the statutory arrangements for granting licences. If reasoning like this applies to the effect of EU law in domestic law, it would defeat the argument that, as we saw Lloyd LJ claim in *Rees-Mogg*, only express restrictions fetter the treaty-making prerogative in

⁵⁴ European Union Act 2011, s 18 (emphasis added).

⁵⁵ UK Supreme Court, *Transcript of Hearing 7 December 2016* page 83, lines 6–11 <<https://www.supremecourt.uk/docs/draft-transcript-wednesday-161207-four-page.pdf>> accessed 27 February 2017.

relation to EU law.⁵⁶ Parliament has explicitly placed extensive restrictions on the prerogative power in relation to EU law, most notably in the European Union Act 2011, but it has placed no express restriction on the executive's exercise of the power to give notice under Article 50(2).⁵⁷ Yet Parliament did not need to place an express restriction on this power, if the *Laker Airways* principle applies in this context—that is, if triggering Article 50 would undermine the effect given to enforceable EU rights in the 1972 Act. Let's consider this argument more closely.

V. THE FRUSTRATION OF PARLIAMENT

The question can be put differently: did the 1972 Act impose an obligation on the government to ratify the accession treaty after the enactment of the 1972 Act? When this question was raised during the hearing, counsel for one of the claimants replied that 'it would have been an abuse of power under *Fire Brigades Union* principles if there was no ratification.'⁵⁸ Lord Carnwath, dissenting, dismissed the relevance of *Fire Brigades Union*, which he said is 'about abuse, not absence, of power.'⁵⁹ But the distinction between questions of scope (whether a prerogative power exists) and questions of abuse (whether an existing prerogative has been properly exercised) is not helpful in either case, which each concern the limits to the government's authority. *Fire Brigades Union* is highly relevant to the questions raised in *Miller*, and it provides the most promising—though, in my view, still ultimately flawed—basis for the majority's claim to have been applying existing constitutional law, namely, the principle that the prerogative cannot be used in a way that would frustrate an Act of Parliament. It is striking, therefore, that the majority barely discussed

⁵⁶ *Rees-Mogg* (n 38) 567 (Lloyd LJ).

⁵⁷ See *Miller* (n 1) [258] (Lord Carnwath).

⁵⁸ UK Supreme Court, *Transcript of Hearing 7 December 2016* page 73, lines 5–7 < <https://www.supremecourt.uk/docs/draft-transcript-wednesday-161207-four-page.pdf> > accessed 27 February 2017.

⁵⁹ *Miller* (n 1) [266] (Lord Carnwath). Lord Pannick QC accepted that his case was about the scope, and not abuse, of the prerogative: UK Supreme Court, *Transcript of Hearing 6 December 2016* page 158, lines 8–25 <<https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf>> accessed 27 February 2017.

this case and, as Lord Carnwath pointed out, did not ultimately rely on it.

The *Fire Brigades Union* case involved the arrangements for the compensation of victims of violent crime. The Criminal Justice Act 1988 provided for a scheme that would give statutory force to the existing, non-statutory scheme for *ex gratia* compensation, usually regarded as having been established under the prerogative. Section 171(1) stated that the relevant statutory provisions ‘shall come into force on such day as the Secretary of State *may* ... appoint’.⁶⁰ Years later, the government decided not to bring the provisions into force, and instead announced that it would use its prerogative to establish a new, less generous tariff scheme. The applicants challenged the government’s decision, on the basis that the 1988 Act had fettered the government’s prerogative. The House of Lords, by a three-to-two majority, interpreted section 171 as imposing ‘a clear duty to keep under consideration from time to time’ whether to bring the relevant provisions into force—a duty which was breached by the decision to introduce a different scheme by an exercise of the prerogative.⁶¹ Lord Browne-Wilkinson said:

[I]t would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme.⁶²

Lord Lloyd of Berwick, who we saw in *Rees-Mogg* had rejected the claim that the 1972 Act had fettered the treaty-making prerogative, held in *Fire Brigades Union* that section 171 should be construed ‘so as to give effect to, rather than frustrate, the legislative policy enshrined in sections 108 to 117, even though those sections are not in force.’⁶³ The minister had discretion to decide *when*—but not *whether*—to bring the statutory scheme into force.⁶⁴

⁶⁰ The Criminal Justice Act 1988, s 171(1) (emphasis added).

⁶¹ *Fire Brigades Union* (n 35) 551 (Lord Browne-Wilkinson).

⁶² *ibid* 552 (Lord Browne-Wilkinson).

⁶³ *ibid* 570 (Lord Lloyd of Berwick).

⁶⁴ *ibid* 570–71 (Lord Lloyd of Berwick).

You can see the suggested analogy between this case and *Miller*. The statutory scheme for criminal injuries compensation, set out in sections 108 to 117 of the 1988 Act, was not in force (and so did not confer any statutory rights), but nonetheless was held to fetter the prerogative power to alter the existing non-statutory scheme. Similarly, the argument runs, the 1972 Act, though not explicitly requiring the ratification of the accession treaty, fettered the Crown's power in 1972 to decide whether to become, and now whether to remain, a member of the EU. As the Divisional Court put it in *Miller*, '[t]he effect of the decision in the *Fire Brigades Union* case was that Parliament could not be taken to have legislated in vain.'⁶⁵

However, the *Fire Brigades Union* case also produced two powerful dissents. The dissenters rejected the majority's view that section 171 imposed a duty that fettered the prerogative. But they also went further. Lord Keith of Kinkel described the majority's decision as a 'most improper' and 'unwarrantable intrusion by the court into the political field and a usurpation of the function of Parliament.'⁶⁶ Lord Mustill argued that, except when deciding the lawfulness of executive action, the court 'has no competence to express any opinion on the relationship between the executive and Parliament.'⁶⁷ These, and similar, remarks are unfortunate to the extent that they call into question the justiciability of the questions before the court, for there is little doubt that the scope of prerogative powers is a question for the court to resolve.⁶⁸ But it was entirely appropriate for them to point out that the abuse of ministerial powers may be better remedied by parliamentary as opposed to judicial controls, that is, by the political rather than legal constitution.⁶⁹ The dissenters in *Miller* were more measured in their criticism of the majority, but they similarly emphasised the executive's accountability to Parliament, Lord Reed

⁶⁵ *Miller* (n 3) [99] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR, and Sales LJ).

⁶⁶ *Fire Brigades Union* (n 35) 544, 546 (Lord Keith of Kinkel).

⁶⁷ *ibid* 560 (Lord Mustill).

⁶⁸ Eric Barendt, 'Constitutional Law and the Criminal Injuries Compensation Scheme' [1995] *Public Law* 357, 364–65.

⁶⁹ For a discussion of this issue in the *Fire Brigades Union* case, see Adam Tomkins, *Public Law* (Clarendon Press 2003) 24–30.

noting that it ‘is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate’.⁷⁰

In both cases, the dissenters’ concerns about judicial intervention in political issues were relevant—though perhaps not conclusive—only because they were justified in rejecting the majority’s conclusion that Parliament had fettered the prerogative. Gavin Phillipson has argued that the majority’s decision in *Fire Brigades Union* ‘was justified by a factor that is arguably not present in the Article 50 case: namely the presence of a straightforward statutory duty on the Minister’.⁷¹ But section 171, the commencement clause, conferred a broad discretion, not a duty. Until the minister exercised his wide discretionary power to bring them into force, the relevant provisions of the statutory scheme granted no enforceable rights to individuals. Moreover, since it was accepted that the minister could take financial considerations into account when considering when to bring the statutory provisions into force,⁷² it must surely follow that he could alter the existing non-statutory scheme on similar grounds.⁷³ Even TRS Allan, a leading modern advocate of greater judicial intervention, has argued that the majority’s judgment in *Fire Brigades Union* was unjustified.⁷⁴ The decision may well have served ‘to *supplement*, not *supplant*, the political constitution’,⁷⁵ but it is hard to avoid the conclusion that it was a supplement that Parliament did not need.

In *Miller*, the majority’s conclusion, which was that the 1972 Act ‘is inconsistent with the future exercise by ministers of any prerogative power to withdraw’, is similarly difficult to sustain.⁷⁶ In making this criticism of the majority, it would be wrong to say that, by adding the Lisbon Treaty (and with it Article 50) to the list of Treaties in section 1(2) of the 1972 Act, the 2008 Act had changed the

⁷⁰ *Miller* (n 1) [240] (Lord Reed). See also *ibid* [249] (Lord Carnwath).

⁷¹ Phillipson (n 12) 1081–82.

⁷² *Fire Brigades Union* (n 35) 574–75 (Lord Nicholls of Birkenhead).

⁷³ TRS Allan, *Constitutional Justice: A Theory of the Rule of Law* (OUP 2001) 171: ‘*A fortiori* ... he could not be obliged to maintain a non-statutory scheme that was thought to have become too great a charge on limited public resources.’

⁷⁴ *ibid* 169–73.

⁷⁵ Tom R Hickman, ‘In Defence of the Legal Constitution’ (2005) 55 *University of Toronto Law Journal* 981, 1018 (emphasis in original).

⁷⁶ *Miller* (n 1) [77].

statutory purpose of the 1972 Act, so that the earlier statute's purpose became to make the UK a member of the EU, 'unless the UK decides to leave'.⁷⁷ The 1972 Act was conditional from the outset. As the Divisional Court in *Miller* acknowledged, when enacting the 1972 Act, Parliament must be taken to have had in mind the possibility that the UK might seek to withdraw from the EU.⁷⁸ The question, as the Divisional Court said, is 'whether Parliament intended that this should be something that the Crown would be able to do through exercise of its prerogative powers without Parliament's intervention.'⁷⁹

On this question, notwithstanding the majority's conclusion, Parliament expressed no view one way or another, in 1972 or at any other time. As Lord Reed explains in his dissenting judgment, at the time of the passage of the 1972 Act it was foreseeable that the accession treaty might not have been ratified, and yet Parliament remained silent on whether ratification was required.⁸⁰ The 1972 Act is also consistent with a prerogative power to withdraw. But that is not to say that the court could not develop the common law to impose a constraint on the prerogative—which is in effect what the Supreme Court did.

VI. A MAJOR CONSTITUTIONAL CHANGE

For the majority, the status of EU law as a source of domestic law entailed that the treaty-making prerogative 'cannot be exercised in relation to the EU Treaties', *regardless of the silence in the 1972 Act*: 'rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist.'⁸¹ Thus, in light of the foregoing, the majority's conclusion can be restated as follows: the prerogative cannot be used to remove a source of rights to which an Act of Parliament has given effect, even

⁷⁷ Craig (n 9) 1061–62; Phillipson (n 12) 1084.

⁷⁸ *Miller* (n 3) [56] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR, and Sales LJ).

⁷⁹ *ibid.*

⁸⁰ *Miller* (n 1) [194] (Lord Reed).

⁸¹ *ibid* [86].

if the removal of that source is consistent with that Act of Parliament. Here is the main reason for this conclusion:

We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law.⁸²

No authority was offered in support of this proposition, and apart from their discussion of the principle of legality, which we will see is contestable in this context, the majority provided no justification for curtailing the prerogative power in this way. As Lord Carnwath said in dissent, the court was ‘shown no authority to support a rule as so stated, nor any principled basis for the court to invent it.’⁸³

One aspect of the majority’s claim ought to be uncontroversial: withdrawing from the EU will be a major constitutional change. Yet this point was rejected by Lord Reed.⁸⁴ His Lordship objected to the majority’s description of the 1972 Act as having ‘a constitutional character’ due to its creation of ‘an entirely new, independent and overriding source of domestic law’.⁸⁵ It is true, as the majority and the minority acknowledged, that EU law is not an *ultimate* source of law, because its validity as a source of domestic law depends on a different source of law, namely an Act of Parliament.⁸⁶ In that sense—and only that sense—it is not an ‘independent’ source of law as the majority described it, though of course it is an independent source in the sense—misleadingly described by the majority as ‘a more fundamental sense’ and ‘a more realistic sense’ (I would rather say merely a different sense)—that it is the EU institutions, not Parliament, that make and change EU law.⁸⁷

⁸² *ibid* [82].

⁸³ *ibid* [264] (Lord Carnwath).

⁸⁴ *ibid* [222]–[229] (Lord Reed).

⁸⁵ *ibid* [80].

⁸⁶ *ibid* [60], [224].

⁸⁷ *ibid* [61]–[62], [65].

But Lord Reed went further and argued that recognition of the validity of EU law in domestic law ‘does not alter any fundamental principle of our constitution.’⁸⁸ The majority was right to reject this objection. Indeed, withdrawal from the EU will be a more fundamental change in our constitution than even the majority acknowledged. The majority rejected the claim that there had been any change to ‘the so-called fundamental rule of recognition’.⁸⁹ The ‘rule of recognition’ was the term used by HLA Hart, the pre-eminent legal philosopher of the twentieth century, in his ground-breaking account of a legal system’s ultimate criteria of legal validity.⁹⁰ The UK’s rule of recognition includes the legal supremacy of Acts of Parliament (or parliamentary sovereignty): what the Queen in Parliament enacts is law. While EU law owes its validity as a source of domestic law to an Act of Parliament, the parliamentary and judicial recognition of the doctrine of the primacy of EU law has changed the ultimate criteria of legal validity.⁹¹ This fundamental constitutional change was not made by Parliament on its own, when it enacted section 2(4) of the 1972 Act. The rule of recognition is determined by the acceptance of law-applying officials, especially judges.⁹² But the constitutional change brought about by this acceptance among officials will inevitably be reversed following *either* the express repeal of the 1972 Act *or* the withdrawal of the UK from the EU.

Thus, we can accept the majority’s argument that there is a difference—perhaps even what they called a ‘vital difference’—between, on the one hand, changing domestic law by contributing to changes in EU law and, on the other, withdrawing from the EU, thereby removing EU law as an overriding source of domestic law: the latter would result in ‘a fundamental change in the constitutional arrangements of the United Kingdom.’⁹³ Put differently, withdrawal from the EU will be a change that is ‘different not just in degree but in

⁸⁸ *ibid* [225] (Lord Reed).

⁸⁹ *ibid* [60]. See also *ibid* [224]–[227] (Lord Reed).

⁹⁰ Hart (n 7) chs 5–6.

⁹¹ *Factortame* (n 53) 659 (Lord Bridge of Harwich). See HWR Wade, ‘Sovereignty—Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568. cf TRS Allan, ‘Parliamentary Sovereignty: Law, Politics, and Revolution’ (1997) 113 *Law Quarterly Review* 443.

⁹² Lord Bingham of Cornhill, ‘The Rule of Law and the Sovereignty of Parliament’ (2008) 19 *King’s Law Journal* 223, 232.

⁹³ *Miller* (n 1) [78].

kind from the abrogation of particular rights, duties or rules derived from EU law.’⁹⁴

But the nature of this constitutional change does not by itself justify the majority’s conclusion that, while there is a prerogative power to contribute to the EU law-making process, there is no prerogative power to leave the EU.⁹⁵ It remains the case that the effect given to EU law as a source of domestic law is ‘inherently contingent on the UK’s continued membership of the EU’, and there is no statutory limit on the use of the prerogative to withdraw.⁹⁶ The majority, relying on the *Simms* principle of legality, argued that the court will require statutory authorisation by express language, or necessary implication, before it will infer that ministers have a ‘far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.’⁹⁷ As the 1972 Act and later statutes were silent on that power, it did not exist.

Strikingly, Lord Reed relied on the very same kind of reasoning to reach exactly the opposite conclusion. Starting from the premise that ‘it is a basic principle of our constitution that the conduct of foreign affairs, including the ratification of treaties, falls within the prerogative powers of the Crown’, Lord Reed argued that this principle ‘is so fundamental that it can only be overridden by express provision or necessary implication.’⁹⁸ As the 1972 Act and later statutes were silent on the prerogative power to withdraw, it continued to exist.

Both the majority and the minority failed to see that the silence of the 1972 Act calls for creative constitutional adjudication, in which the question is whether the common law should be developed to recognise a constraint on the prerogative in this context. Resisting this type of adjudication, Gavin Phillipson warned that the judges in *Miller* should intervene only if ‘they are fairly *certain* that the law requires

⁹⁴ *ibid* [81].

⁹⁵ *ibid* [95].

⁹⁶ *ibid* [230] (Lord Reed).

⁹⁷ *ibid* [87] and [108], citing *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann): ‘[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.’

⁹⁸ *ibid* [194] (Lord Reed).

them to'.⁹⁹ But, as noted at the outset of this article, judges have the power to develop the law where it is silent or indeterminate, making both the majority and the minority's decisions constitutionally permissible.¹⁰⁰ In such circumstances, not intervening may be considered to be just as 'activist', or creative, as intervening.¹⁰¹ We can accept the majority's decision only if we can explain why it would be morally or politically illegitimate for the executive to have the power to withdraw from the EU without parliamentary authorisation.

VII. CONSTITUTIONALLY PERMISSIBLE DECISIONS

Opening the door to the question of the legitimacy of a prerogative power to trigger Article 50, we are faced with a broad range of considerations. There are considerations that go to the question of whether the decision can legitimately be made by the executive or only by Parliament. And then there are considerations that go to the question of whether it is right for the court to intervene to make parliamentary authorisation a legal requirement.

Once the question is posed, 'Who should make the decision to withdraw from the EU?', the answer may seem obvious: Parliament should decide, and maybe the people in a referendum, but certainly not the executive. On this simple view, the executive cannot have the legitimate authority to make this decision, because if it did then it would have been open to the executive, at any time on or after 2 January 1972, to withdraw from the EU Treaties without parliamentary authorisation, even if there had been no referendum or if a referendum had resulted in a vote to remain. The majority described these as 'implausible propositions', and used them to highlight the 'improbability of the Secretary of State's case'.¹⁰²

This simple view is too simplistic. The improbability is that the executive would decide to withdraw in the absence of a referendum, or in the face of a vote to remain, but this improbability is no reason

⁹⁹ cf Phillipson (n 12) 1082 (emphasis in original).

¹⁰⁰ See Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge 1989); Stephen Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *Law Quarterly Review* 270. 289–91.

¹⁰¹ Sedley (n 100) 291.

¹⁰² *Miller* (n 1) [91].

for denying the existence of that power. If, implausibly, the executive had attempted to use its power in this way, it would have been accountable to the courts through judicial review and to Parliament through the convention of ministerial responsibility. The majority was highly dismissive of both forms of accountability: they described the availability of judicial review as ‘rather a bold suggestion’ given the traditional view that ‘prerogative treaty-making powers are not subject to judicial review’; and they described the relevance of the executive’s accountability to Parliament as ‘a potentially controversial argument constitutionally’, because it ‘would justify all sorts of powers being accorded to the executive’.¹⁰³ Both objections are well wide of the mark.

The majority considered themselves able to intervene in *Miller* because they were concerned with the existence, or scope, of the prerogative power, rather than its exercise. The latter is no longer considered immune from judicial review, though the courts are often reluctant to intervene, especially in the exercise of the treaty-making prerogative.¹⁰⁴ During the hearing, Lord Reed suggested that, if the question is about the exercise, rather than the existence, of the prerogative—that is, about whether the executive has abused its power, rather than exceeded it—then the referendum result would become a relevant consideration.¹⁰⁵ Lord Pannick QC agreed: ‘Once we are into questions of abuse ... the court will plainly give the broadest of discretion, and that is not our case.’¹⁰⁶

But, as I suggested earlier, the distinction between questions of abuse and excess of power is to a large extent unhelpful, especially when, as in this case, statute and precedent are indeterminate. In such circumstances, the court must demarcate the scope of the executive’s legitimate authority, which requires an assessment of the justification of executive authority and the same considerations that are involved in deciding whether the court should intervene to remedy an abuse of

¹⁰³ *ibid* [92].

¹⁰⁴ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411 (Lord Diplock), 418 (Lord Roskill). See also *JH Rayner (Mincing Lane Ltd) v DTI* [1990] 2 AC 418, 500; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [237] (Lord Kerr).

¹⁰⁵ UK Supreme Court, *Transcript of Hearing 6 December 2016* page 158, lines 8–13 <<https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf>> accessed 27 February 2017.

¹⁰⁶ *ibid* page 158, lines 21–24. See also *Miller* (n 1) [266] (Lord Carnwath).

power. In the context of the *Miller* case, Timothy Endicott has provided a good analysis of the justification of executive authority, and the need for, as Blackstone put it, ‘unity, strength and dispatch’ in the executive function.¹⁰⁷ A variety of considerations are relevant, including the referendum result and the executive’s accountability to Parliament.¹⁰⁸

The referendum result may be thought to be especially relevant, and it is not just the tabloid journalists quoted earlier who take this view.¹⁰⁹ The referendum itself is not a source of law and cannot be legally binding unless an Act of Parliament makes it legally binding. The EU Referendum Act 2015, unlike other legislation establishing referendums,¹¹⁰ imposed no duty on the government to implement the result. But the court could have held that the referendum was a relevant consideration, which, in effect, gave the government the legitimate authority to decide to trigger Article 50.¹¹¹

Yet there is much disagreement about the respective merits of direct democracy and representative democracy. The primacy of the latter in the traditional understanding of the UK constitution led the House of Lords Constitution Committee to conclude that it would be ‘constitutionally inappropriate’ for the executive to act on an advisory

¹⁰⁷ Timothy Endicott, *Parliament and the Prerogative: From the Case of Proclamations to Miller* (Policy Exchange 2016) esp 15–24. See also *Miller* (n 1) [160] (Lord Reed); Phillipson (n 12) 1078–80.

¹⁰⁸ For the opposite view, doubting whether, as Lord Carnwath suggested at *Miller* (n 1) [249], the fact that the executive would be accountable to Parliament for the exercise of a prerogative power could affect the court’s determination of whether that power exists in the first place, see Mark Elliott, ‘Analysis: The Supreme Court’s Judgment in *Miller*’ (*Public Law for Everyone*, 25 January 2017) <<https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>> accessed 27 February 2017.

¹⁰⁹ For a brief but more sophisticated defence of this argument, see Leslie Green, ‘Should Parliamentary Sovereignty Trump Popular Sovereignty?’ (*Semper Viridis*, 3 November 2016) <<https://ljmgreen.com/2016/11/03/should-parliamentary-sovereignty-trump-popular-sovereignty/>> accessed 27 February 2017.

¹¹⁰ See eg the Parliamentary Voting System and Constituencies Act 2011, s 8.

¹¹¹ cf Philip Allott, ‘Forget the politics—Brexit may be unlawful’ (*The Guardian*, 30 June 2016), making the highly implausible suggestion that ‘it is possible that a court might take the view that it is arbitrary and unreasonable and disproportionate, in the legal sense of those words, to base the vastly important decision to withdraw from the EU on the opinion expressed by a bare majority of people taking part in a referendum’.

referendum without explicit parliamentary approval.¹¹² Although the Constitution Committee said nothing to justify (and much to contradict) its conclusion that it would be *constitutionally* inappropriate,¹¹³ there is certainly a strong argument for the conclusion that, in view of the importance—indeed, the constitutional importance—of withdrawing from the EU, in a representative democracy this decision ought to be made by Parliament.

These of course do not exhaust the considerations relevant to the question whether the executive has legitimate authority to trigger Article 50, but they are illustrative. My point here is that, whether you agree with the majority or the minority in *Miller*, the decision must be justified on the basis of considerations such as these. It cannot be justified by constitutional requirements, for each decision was constitutionally permissible until the majority made parliamentary authorisation a requirement.

VIII. LAW, CONVENTION, AND DEVOLUTION

If the UK's constitution is as flexible as this suggests, was it also open to the Supreme Court to decide whether the consent of the Scottish Parliament, the Welsh Assembly, and the Northern Ireland Assembly is required before Article 50 is triggered? The requirement to seek the consent of these devolved legislatures when legislation affects devolved matters—a requirement known as the ‘Sewel convention’—has always been understood to be a ‘political restriction’, unenforceable by a court.¹¹⁴ But the Lord Advocate on behalf of the Scottish Government, the Counsel General for Wales, and the Attorney General for Northern Ireland, argued that the convention should now be interpreted and applied by the court. If accepted, this argument would undoubtedly have been by far the most significant and far-reaching part of the case. But the Supreme Court unanimously—and, in my view, rightly—rejected the argument.¹¹⁵

¹¹² House of Lords Select Committee on the Constitution, *The Invoking of Article 50* (HL 2016–17, 44–I) para 24.

¹¹³ The Committee accepted that there is no constitutional convention to that effect, and it expressed no view on whether parliamentary involvement is a legal requirement: *ibid* paras 16 and 22.

¹¹⁴ *Imperial Tobacco v Lord Advocate* 2012 SC 297 [71] (Lord Reed).

¹¹⁵ *Miller* (n 1) [129]–[151], [242], [243], [282].

Constitutional conventions are an important part of any constitution, but they are especially important in the United Kingdom. They are rules of the constitution that are often defined in contrast with law: as AV Dicey described them, they ‘are not in reality law at all since they are not enforced by the Courts’.¹¹⁶ Dicey believed that all the conventions of the constitution have ‘one ultimate object’, which is to ensure that Parliament and the Crown ‘give effect to the will of that power which ... is the true political sovereign of the state—the majority of the electors’.¹¹⁷ That aim may explain why officials adhere, or should adhere, to some of the constitutional conventions, but in any case the motivations behind conventions do not determine their existence and content.

The existence and content of conventional rules depend on two factors: first, there must be a regularity of behaviour, and secondly, the participants must regard their behaviour as obligatory, and not merely as a habit.¹¹⁸ To the extent that the constitution consists of conventions, therefore, the constitution is ‘what happens’, as John Griffith put it,¹¹⁹ for constitutional conventions are determined by what the officials (broadly defined to include ministers, civil servants, parliamentarians, and so forth) actually do, backed by a consensus that what they do is also what they ought to do. But because conventional rules depend on a common practice and acceptance among officials, they break down and become indeterminate when there is disagreement. At that stage, there is really no rule at all, and we are left with political claims about what ought to happen.¹²⁰

During the second reading debate of the Scotland Bill in 1998, Lord Sewel, a government minister, told Parliament that ‘we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without

¹¹⁶ AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan 1885) 25.

¹¹⁷ *ibid* 429.

¹¹⁸ Sir Ivor Jennings argued that a third factor is necessary, namely, there must be a reason for the rule: Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136. cf Kenneth Wheare, *Modern Constitutions* (2nd edn, OUP 1966) 122. See also NW Barber, *The Constitutional State* (OUP 2010) 82–85.

¹¹⁹ JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1, 19.

¹²⁰ See further Joseph Jaconelli, ‘Do Constitutional Conventions Bind?’ (2005) 64 *Cambridge Law Journal* 149.

the consent of the Scottish Parliament.’¹²¹ This reassurance was necessary because section 28(7) of the Scotland Act 1998 provides that the legal supremacy of Acts of the UK Parliament is unaffected by devolution. Consistently with this legal supremacy, Lord Sewel’s statement, which was later reflected in a Memorandum of Understanding, explained what ought to happen ‘normally’.¹²² Of course, a statement or a Memorandum of Understanding does not make a convention. But there is strong evidence that a convention to this effect has developed, not only for legislation on devolved matters, but also for legislation that alters the competence of the devolved institutions, at least in Scotland and Wales.

The disagreement about whether the consent of the devolved legislatures is necessary before triggering Article 50 is evidence that the convention is indeterminate on that question. What we have are competing political claims, but no conventional rule that can settle the matter. There is not only a lack of general acceptance on this point, but also a lack of settled practice. Importantly, as the Supreme Court noted in the *Miller* case, ‘legislation which implements changes to the competences of EU institutions and thereby affects devolved competencies ... has not been the subject of legislative consent motions in any devolved legislature.’¹²³

Given these features of constitutional conventions in general, and the Sewel convention in particular, the Supreme Court in *Miller* was therefore right to maintain the orthodox position on their non-justiciability: ‘Judges,’ they said, ‘are neither the parents nor the guardians of political conventions; they are merely observers.’¹²⁴ While there have been instances when the courts have interpreted constitutional conventions,¹²⁵ these instances have always been when the law requires the courts to take into account non-legal

¹²¹ HL Deb 21 July 1998, vol 592, col 791.

¹²² See Richard Rawlings, ‘Concordats of the Constitution’ (2000) 116 *Law Quarterly Review* 257.

¹²³ *Miller* (n 1) [140].

¹²⁴ *ibid* [146].

¹²⁵ See *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752; *Evans v Information Commissioner* [2012] UKUT 313.

considerations such as constitutional conventions,¹²⁶ which have never been directly legally enforceable.¹²⁷

Two objections to the Supreme Court's judgment on this point have been raised, however. First, Article 50(1), you will recall, states that the decision to withdraw from the EU must be 'in accordance with the Member State's own constitutional requirements'. It was argued that this provision required the court to determine what *all* the constitutional requirements are, including the conventional ones. This argument was clearly flawed, so much so that the Supreme Court did not even discuss it. Article 50(1) did not confer jurisdiction on the courts to assume the role of guardians of the whole constitution, including its political conventions. To the extent that conventions are political requirements, they are requirements enforced by the officials whose behaviour determines their content.

Secondly, in 2016 the Scotland Act 1998 was amended to include a new section 28(8), which states that 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.' It was argued that this legislative recognition of the Sewel convention turned it into a legal rule that the courts could interpret. The main problem with this argument, however, is that the subsection is clearly declaratory of an existing practice ('it is recognised'), and explicitly incorporates the vagueness of Lord Sewel's statement and the Memorandum of Understanding ('will not normally'). As the Supreme Court pointed out, this language—in the majority's words, 'recognising the convention for what it is, namely a political convention'—is hardly indicative of a legislative intention to turn the convention into a legal rule justiciable by the courts.¹²⁸ Legislation that

¹²⁶ See David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change: A Festschrift for Vernon Bogdanor* (Bloomsbury 2013); TRS Allan, 'Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*' (2016) 75 *Cambridge Law Journal* 38, 48–53.

¹²⁷ See *Re: Resolution to amend the Constitution* [1981] 1 SCR 753 (305), 877–78, which did not enforce the convention requiring the consent of the provinces, but acknowledges the existence of that convention. cf TRS Allan, 'Law, Conventions, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45 *Cambridge Law Journal* 305; TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) ch 2.

¹²⁸ *Miller* (n 1) [149].

does not create a legal rule may seem odd, but it is more common than you might think.¹²⁹

The Supreme Court went on to say, in a remark that called for (but did not receive) further explanation, that ‘the purpose of the legislative recognition of the convention was to entrench it as a convention.’¹³⁰ Aside from acknowledging a pre-existing convention, the purpose of the legal recognition is unclear. But its effect is clear enough: it changed nothing. The convention remains just what it was before its recognition in statute, because the Sewel convention’s non-justiciability ‘follows from the nature of its content’.¹³¹ Its content, as discussed above, is determined by the behaviour of the officials who are subject to the rule, and where there is disagreement, only political argument can settle what should happen.

The legal supremacy of Acts of Parliament provides a further reason for the court to avoid interpreting, let alone enforcing, the Sewel convention. We must emphasise that the submissions from the devolved institutions did *not* challenge the UK Parliament’s legislative supremacy.¹³² They were not questioning the validity of any statute authorising the triggering of Article 50 without the consent of the devolved legislatures. Yet they were asking the court to rule that the constitutional requirements for the purposes of Article 50(1) include the legislative consent of the devolved institutions. The effect of such a ruling, despite their claims to the contrary, would have been inconsistent with Article 9 of the Bill of Rights 1689, which prohibits courts from questioning parliamentary proceedings.¹³³ Moreover, if the court had held that the Sewel convention is a constitutional requirement, the effect of that ruling would have been purely political, given the continuing commitment to the legislative supremacy of the UK parliament, a constitutional requirement that overrides the lack of devolved consent. That provides yet another reason why the Supreme Court was right not to be drawn into the politics of devolution.

¹²⁹ See David Feldman, ‘Legislation Which Bears No Law’ (2015) 37 *Statute Law Review* 212.

¹³⁰ *Miller* (n 1) [149].

¹³¹ *ibid* [148].

¹³² See eg Written Case of Lord Advocate, para 86: ‘If the UK Parliament were to choose to pass an Act of Parliament without the consent of the Scottish Parliament, the courts could not decline to recognise the validity of the resulting Act of Parliament.’

¹³³ *Miller* (n 1) [145].

There is an irony in seeking to use the Sewel convention as an obstacle to a process—the UK’s withdrawal from the EU—that will, as the majority in *Miller* noted, ‘enhance the devolved competence’.¹³⁴ This use of the Sewel convention is in one respect a reversal of another attempt to constrain the authority of the Crown-in-Parliament in order to protect Scots law. Article XVIII of the Acts of Union of 1706 and 1707, part of which was cited in support of the majority’s conclusion that an Act of Parliament was legally required for the UK to withdraw from the EU,¹³⁵ was used in the 1970s—unsuccessfully—to challenge the UK’s *accession* to the EEC and the validity of the 1972 Act.¹³⁶ Article XVIII states that ‘no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland.’ This, like the Sewel convention, has the purpose of protecting Scotland’s distinct legal identity. But the principles beneath these two provisions—that changes to Scots law should be for the ‘evident utility’ of subjects in Scotland and, if on a devolved matter or altering the competence of the devolved legislature, should be made with the Scottish Parliament’s consent—could each be invoked to challenge EU laws as much as UK laws. Yet, as already mentioned, the Sewel convention has not been used in that way.¹³⁷ In so far as withdrawal from the EU will remove rights that are within the competence of the Scottish Parliament, it will be open to the Scottish Parliament to enact new rights, replicating EU rights if it wishes. The Scottish Parliament will have more control over those matters than it currently does. If people want to preserve and develop Scots law’s distinctiveness from English law, we might expect them similarly to want to preserve and develop its distinctiveness from the law of the EU.¹³⁸

¹³⁴ *ibid* [130].

¹³⁵ The majority quoted that part of Article XVIII that states that the laws of Scotland are ‘alterable by the Parliament of Great Britain’: *ibid* [44]. The majority did not quote the part that follows in the text.

¹³⁶ *Gibson v Lord Advocate* 1975 SLT 134.

¹³⁷ *Miller* (n 1) [140].

¹³⁸ Adam Tomkins, ‘The Constitutional Law in *MacCormick v Lord Advocate*’ [2004] *Juridical Review* 213, 224: ‘Those who are concerned about the continuing ability of Scots law to develop and defend its own principles and doctrines of public law ... should perhaps fret a little less about keeping Scots law distinct from English and should worry a little more about the apparently ever increasing Europeanisation of domestic public law.’

Of course, the real reason behind the demand for obstacles to the UK's withdrawal from the EU is not that it is required by the Sewel convention, but that a majority of people in Scotland and Northern Ireland who voted in the referendum on 23 June 2016 voted for the UK to remain in the EU. But that consideration, like the argument about the Sewel convention, is legally (and, in my view, morally) irrelevant to the authority of the UK Parliament to legislate for withdrawal. Faced with claims about the legal supremacy of Parliament, advocates of Scottish exceptionalism usually wheel out Lord Cooper's eccentric and *obiter* remarks in *MacCormick v Lord Advocate*.¹³⁹ Although he was not convinced that the court had jurisdiction to determine the constitutionality of an Act of Parliament (an important qualification!), Lord Cooper remarked that '[t]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.'¹⁴⁰ In *Miller*, the Lord Advocate cited these remarks in support of his argument, despite his claim not to be challenging the UK Parliament's legislative supremacy.¹⁴¹

Arguments from popular sovereignty, as Dicey acknowledged, may inform the development of non-legal, political constraints on the UK Parliament.¹⁴² These are especially contested when the question is who counts as 'the people' in the appeal to popular sovereignty. But these arguments, while contributing to a fiercely contested and unsettled constitutional future, have not yet changed the rule of recognition. Of course, the rule of recognition can change—as we saw

¹³⁹ *MacCormick v Lord Advocate* 1953 SC 396 (Court of Session)

¹⁴⁰ *ibid.* Contrast this with the remarks from the influential Scottish judge, Lord Reid: *British Railways Board v Pickin* [1974] AC 765, 782 (Lord Reid): 'the idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution.' cf Neil MacCormick, 'Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*' (1978) 29 *Northern Ireland Legal Quarterly* 1.

¹⁴¹ Written Case of Lord Advocate, para 30. See also Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79 *Modern Law Review* 1019, 1037–38.

¹⁴² cf Vernon Bogdanor, 'Brexit, the Constitution and the Alternatives' (2016) 27 *King's Law Journal* 314, 314, describing 'the introduction of a new principle into the British Constitution—the principle of the sovereignty of the people, a principle which, on this issue at least, supersedes the doctrine of the sovereignty of Parliament.'

it did following the UK's acceptance of the doctrine of EU law supremacy—but it changes only when there is a change in the practice of those who use the rule of recognition and tacitly presuppose its existence. Nothing in the devolution arrangements has had that effect.

For all these reasons, the Supreme Court was right to conclude that the Sewel convention is not a legal rule justiciable by the court. More than most, ours is a flexible constitution, and the judges are not its guardians. Judges are the guardians of the rule of law, and it is in that capacity that they determined whether Her Majesty's Government had a prerogative power to trigger Article 50. The fact that, as I have argued, the law was indeterminate on that question, and that the court was therefore required to turn to extra-legal considerations, does not entail that the court has jurisdiction to adjudicate on non-legal rules generally.

IX. PARLIAMENT AND THE JUDICIARY

The myth of *Miller* is that the majority defended established constitutional principles, safeguarding the balance of power between the executive and the sovereign Parliament.¹⁴³ This is a myth because the balance of power was not in doubt: there was no challenge to Parliament's legislative supremacy.¹⁴⁴ There is no doubt that, as in the *Fire Brigades Union* case, Parliament could have asserted its authority itself. It was open to Parliament, at any time before or after the referendum on 23 June 2016, to enact a statute requiring the government to seek parliamentary authorisation before triggering Article 50. Parliament did not need the judiciary to come to its defence.

In my view, it was right that Parliament should make this decision. A decision as momentous as the decision to withdraw from the EU should be made not by the government in the exercise of its royal prerogative, nor by the voters in a referendum, but by Parliament

¹⁴³ See eg Thomas Poole, 'Losing Our Religion? Public Law and Brexit' (2016) LSE Law, Society and Economy Working Paper 24/2016, <https://www.lse.ac.uk/collections/law/wps/WPS2016-24_Poole.pdf> accessed 27 February 2017.

¹⁴⁴ This is worth emphasising, given the sporadic judicial rhetoric questioning the legislative supremacy of Parliament elsewhere: cf *Jackson v Attorney General* [2005] UKHL 56 [102] (Lord Steyn), [104]–[107] (Lord Hope of Craighead), [159] (Lady Hale of Richmond).

in the fulfilment of its role as the UK's representative and deliberative institution. Indeed, I think there was a very strong argument for MPs to vote against triggering Article 50, despite the referendum result. During the debate on the European Union (Notification of Withdrawal) Bill, Kenneth Clarke MP, paraphrasing Edmund Burke, said, 'If I no longer give you the benefit of my judgment and simply follow your orders, I am not serving you; I am betraying you.'¹⁴⁵ There is much in this argument, though, not surprisingly, it was not a popular one among MPs.

But was it right for the Supreme Court to make parliamentary authorisation a legal requirement? The creative element of constitutional adjudication in this case may lead some to suspect that a democratic objection may be relevant. For democratic objections can be levelled not only against rights-based constitutional review, but also against structural constitutional review.¹⁴⁶ However, even if such objections are sound, this kind of structural constitutional adjudication is less significant in a system such as ours that continues to recognise the legal supremacy of Acts of Parliament—in contrast with a federal system—because it is always open to Parliament to legislate.

The arguments for and against the court's intervention in *Miller* were more finely balanced than both sides admit. But one practical argument is worth highlighting. Although it was always open to Parliament to make its voice heard and legislate, MPs, fearful of their constituents' reactions, were reluctant to insist that parliamentary authorisation was necessary before the government could start the process of withdrawing. In other words, the parliamentary will to legislate in the face of the referendum result was lacking. Whatever your view on the merits of the *Miller* judgment, we should regret the image of a Parliament that is unwilling to assert its authority without the impetus of the judiciary.

¹⁴⁵ HC Deb 31 January 2017, vol 620, col 831. See Edmund Burke, *The Works of Edmund Burke: Volume 1* (Holdsworth and Ball 1834) 176–80: 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.'

¹⁴⁶ See Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 *Oxford Journal of Legal Studies* 1; Adrienne Stone, 'Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law' (2010) 60 *University of Toronto Law Journal* 109.